

Subpart D—Requests From Contractor Counsel To Initiate, Defend, and Settle Legal Matters

§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?

(a) The contractor must provide written notice to Department Counsel prior to initiating litigation or appealing from adverse decisions.

(b) The contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department Counsel.

(c) The following information must be provided to Department Counsel by the contractor prior to initiating litigation or appealing an adverse decision:

- (1) Identification of the proposed parties;
- (2) The nature of the proposed action;
- (3) Relief sought;
- (4) Venue;
- (5) Proposed representation and reason for selection;
- (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
- (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
- (8) Whether, for any reason, the contractor will assume any part of the costs of the action;
- (9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and
- (10) A discussion regarding why initiating litigation would prove beneficial to the contractor and to the Department.

§ 719.31 When must the contractor initiate litigation against third parties?

The contractor must initiate litigation, upon the request of the contracting officer, against third parties including proceedings before administrative agencies, in connection with the contract. The contractor shall pro-

ceed with such litigation in good faith and as directed from time to time by Department Counsel.

§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?

(a) The contractor shall give the contracting officer and Department Counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency and any claim which will be handled by a retrospective insurance carrier if costs (including Legal costs, settlements, claims paid, damages, etc.) are likely to be \$100,000 or more, filed against the contractor arising out of the performance of the contract and shall provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the contractor as to:

- (1) Whether the contractor must authorize the Government to defend the action;
- (2) Whether the Government will take charge of the action; or
- (3) Whether the Government must receive an assignment of the contractor's rights.

(b) The contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.

(c) If the costs and expenses associated with the legal proceeding against the contractor are potentially allowable under the contract, the contractor shall:

- (1) Authorize Department representatives to collaborate with contractor in-house counsel or Department Counsel-approved outside counsel in settling or defending the legal proceeding; or counsel for any associated insurance carrier in settling or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and

(2) Authorize Department representatives to settle the legal proceeding or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by

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bond or is insured by an insurance policy other than retrospective insurance.

§ 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?

The contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires contractor payment of \$25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the legal costs incurred in connection with the underlying legal matter will be determined to be allowable.

§ 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?

The contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

- (a) The amount of any proposed monetary settlement payment.
- (b) Titles and docket numbers associated with the case(s) for which the contractor is seeking approval to settle;
- (c) The procedural history of the case(s) or issue(s);
- (d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;
- (e) A description of the history of the settlement discussions;
- (f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the contractor entering into the proposed agreement;
- (g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;
- (h) A description as to why settlement of the matter is in the best interest of the Department; and

- (i) Any additional supporting documents requested by Department Counsel.

§ 719.35 When must the contractor provide a copy of an executed settlement agreement?

A contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

Subpart E—Reimbursement of Costs Subject to This Part

§ 719.40 What effect do the regulations of this part have on cost allowability?

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs in accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.

§ 719.41 How does the Department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider among other things:

- (a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;
- (b) Whether lower rates from other firms providing comparable services, at appropriate competency and experience levels, were available;
- (c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and
- (d) The complexity of the legal matter and the expertise of the law firm in this area.

§ 719.42 What categories of costs are unallowable?

- (a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48